

**UNITED STATES SENATE
SPECIAL COMMITTEE ON AGING**

**Senator Larry E. Craig, Idaho, Chairman
Senator John B. Breaux, Louisiana, Ranking Member**

**FORUM ON GUARDIANSHIP
July 22, 2004**

**GUARDIANSHIP ISSUES RELATING TO STATE LAWS
ON OVERSIGHT; COURT TRAINING AND
MONITORING; AND LACK OF STATE AND FEDERAL
COLLABORATION**

By

A. Frank Johns, JD, CELA, R-G

WRITTEN TESTIMONY

WRITTEN COMMENTS

A. Frank Johns

July 22, 2004

Page 2

GUARDIANSHIP ISSUES RELATING TO STATE LAWS ON OVERSIGHT; COURT TRAINING AND MONITORING; AND LACK OF STATE AND FEDERAL COLLABORATION

By

A. Frank Johns, JD, CELA*, R-G¹

Mr. Chairman and members of the Committee, and Ms. Bovbjerg, and representatives of the General Accountability Office, thank you for the opportunity to participate in this forum on guardianship issues relating to state laws on oversight; court training and monitoring; and lack of state and federal collaboration.

It was with foresight and committed interest that this committee through its chair, Senator Larry Craig, requested a study of guardianship² by the Government Accountability Office. I am pleased to be among those invited to the committee's guardianship forum at which the GAO Report is being presented. I am certain that many of the points raised in my remarks are thoroughly examined and assessed by the GAO. As the representative of the National Academy of Elder Law Attorneys and as a member of the National Guardianship Network, I am pleased to extend the full support of these organizations in assisting in the implementation of the GAO's recommendations.

My remarks and opinions are forged from more than 25 years of legal advocacy and trial practice in guardianship, and from more than 15 years of academic writing and research. My participation is due in large measure to my membership in and extensive work with the National Academy of Elder Law Attorneys, in which I am a Fellow and past president, and one of the academy's representatives in the National Guardianship Network. It is also due to my longtime association with the National Guardianship Association, of which I was a founding Board member. Portions of this testimony were previously published in written remarks of the author submitted to this committee in 1992 and 2003.

¹ J.D., Florida State University College of Law; CELA, *certified as an elder law attorney by the National Elder Law Foundation; partner in the firm of Booth Harrington & Johns, L.L.P., Greensboro and Charlotte, North Carolina, concentrating in Elder Law; Fellow and past president of the National Academy of Elder Law Attorneys; charter board and president-elect National Guardianship Association; past Charter Chair, Elder Law Section of the North Carolina Bar Association; Fellow in the American College of Trust and Estate Counsel (ACTEC).

² Like many other notes, comments and articles, the words "guardian" and "guardianship" in this written testimony include the broad spectrum of words and language used across the country to describe surrogate decision-making for another person through court appointment that transfers the power over an individual's rights, liberties, placement and finances to another person or entity. These words and language include, but are not limited to, conservatorship, interdiction, committee, curator, fiduciary, visitor, public trustee and next friend.

WRITTEN COMMENTS

A. Frank Johns

July 22, 2004

Page 3

I. WINGSPAN AND THE RECOMMENDATIONS RELATED TO TRAINING, OVERSIGHT AND MONITORING AND COLLABORATION

In July of 1988, Wingspread – the First National Guardianship Conference produced a set of landmark recommendations for reform of guardianship across the country. More than a decade later, in November of 2001, Wingspan: the Second National Guardianship Conference was convened to examine what progress had been made in the interim, and what steps should be recommended for the future.

Wingspan conferees produced more than 75 recommendations considered by the full conference under procedures that permitted time-limited discussion and floor amendments. Recommendations that received more than 50 percent support of the conferees became the official recommendations of Wingspan. Numerous specific recommendations related to oversight, education and training, monitoring and federal linkage are shown below.

In November of this year, at a joint conference of the National Academy of Elder Law Attorneys, the National College of Probate Judges and the National Guardianship Association, an invitation only Wingspan Implementation Session will be convened to develop ways by which the states may be assisted in reforming their guardianship laws, developing guardianship data bases and expanding education and monitoring.

II. STATE STATUTORY REFORM RELATED TO OVERSIGHT

Has there been any measurable reform in state oversight of guardianship? Whether measuring reform related to due process or oversight, true reform is measured by chronicling the gains in oversight made across the country in each state's guardianship statute. Simply tracking the paper chase of reform from state to state is a daunting task made easier by Erica Wood, American Bar Association Commission on Law and Aging, and her annual review of state legislative changes in guardianship statutes for the benefit of the elder law bar and the aging network;³ and to Sally Balch Hurme, AARP, and her graphs that track the spectrum of guardianship from beginning to end.⁴

³ See A. Frank Johns, *Tens Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 Elderlaw J. 33, 78-88 (Fall, 1999)(a summary of the ten years from 1988 to 1998 that Wood followed state legislative statutory reform. Note: Wood has kept the updates current through 2004).

⁴ *Id.*, at 33, and 110-152, Exhibits "C" – "H" (Hurme's 1998 graphs of the 50 states and DC guardianship statutes from beginning to end). Note: Hurme has kept the guardianship current though 2004.

WRITTEN COMMENTS

A. Frank Johns

July 22, 2004

Page 4

However, the state statutory changes are arguably less than a true measure of guardianship reform, possibly just a mask of virtual reality?⁵ When this witness examined the twenty most significant empirical research projects and studies over thirty years from the '60s through the '90s, they comprised a striking composite of how far changes in the laws have gone, and how implementation of those changes may have gone virtually nowhere:

It is analogous to the technological wizardry of virtual reality. Once you have the mask over your eyes, you see where you are going as if you were actually there - but you have gone nowhere. If seeing is believing, then you believe that you have gone as far as the images in the mask have taken you. The changes in the guardianship laws over the past several decades may only be a mask of virtual reality. The changes in law mask the real world reality, and provide for those looking through the mask the opportunity to see where they are going as if they were actually going there - but they have gone nowhere. However, since seeing is believing, they believe that real world implementation of rights, procedures, public and private programs, monitoring and enforcement benefits vulnerable and unprotected older Americans who because of intrusive intervention have been placed in the guardianship process. However, they have gone only as far as the mask of images of changes in guardianship laws has taken them.⁶

In the past, there has been unanimity and clarity in the answer to the question of measurable reform in guardianship – too many states provide little if any funded support of statutory requirements for guardianship oversight. The result has produced judicial inattention to the quality of the lives of the persons over whom the courts have jurisdiction and control.

It is clear that any attempt at reform requires re-education and training of the judiciary and the social agencies that support it. Professor Lawrence A. Frolik surmised:

No matter how many reforms or counter-reforms are enacted, no matter how the system is modified, there is no perfection this side of paradise. Rather [than focusing on reforming the guardianship system]...those concerned [should focus on] the actors in the guardianship system, and how the actors' behaviors might be improved.⁷

There are a few well-recognized “actors in the guardianship system” where a “best practice” of education and training in the judiciary has delivered programs of productive

⁵ See A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the 21st Century*, 27 Stetson L. Rev. 1, 28-29 (Summer, 1997).

⁶ *Id.*

⁷ See Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good*, 9:2 Stanford Law and Policy Review 347, 351 (Spring 1998).

WRITTEN COMMENTS

A. Frank Johns

July 22, 2004

Page 5

oversight, monitoring and accountability.⁸ Those programs should be modeled and replicated across the country. In many states, however, the probate judges are not the real problem or impediment to oversight and reform. The real problem is that guardianship is considered insignificant, not even reaching the bottom of the list of priorities over which state judicial branches are most concerned.

The question is further answered from another angle with the same unanimity and just as much clarity - there is too little, if any, current reliable data from which to draw conclusions.

Ingo Keiltz, previously associated with the National Center of State Courts, commenting at the 1992 round table of this committee, raised the need for a national database on guardianship.⁹ He commented that Associated Press reporters were astonished to find that there

⁸ Several years ago, this author acknowledged many probate court judges, or judges in courts having jurisdiction over guardianships and conservatorships, that have served for all the right reasons, with heartfelt, dedicated interests in those being adjudicated in their courtrooms and subsequently being protected under their statutory duties and jurisdictional boundaries. Many are so well known that they are often named in studies and writings, or identified on panels, committees and task forces that address the issues. They include, The Honorable John Kirkendall, Probate Court Judge in Ann Arbor, Michigan, The Honorable Thomas E. Penick, Jr., Judge, Circuit Court, Clearwater, Florida, The Honorable Kristin B. Glen, Justice, Supreme Court, New York, New York, The Honorable Isabella H. Grant, Judge, Superior Court, San Francisco, California, The Honorable John R. Maher, Probate Court Judge, Kingston, New Hampshire, The Honorable Mary Sheffield, Probate Court Judge, Rolla, Missouri, and The Honorable Field Benton, Probate Court Judge, Denver, Colorado. While countless other probate court judges are included but unnamed, the committee has before it the Honorable Irvin G. Condon of Charleston County, South Carolina, and Chief Judge Mel Grossman of Broward County, Florida.

Many probate judges are similar to Judge Nikki DeShazo, a Probate Court Judge in Dallas, Texas who described her reasons for seeking a probate judgeship:

. . . I found I really wanted to be where people could find a friend and get help. . . I wanted to help people. I wanted to work in an area that would enhance people's feelings of self-worth. Probate Court can really be a pleasant, rewarding place to work. . . I am distressed that societal changes have isolated people, so that they do [not] know their neighbors. There is no one to care about and look out for neighbors. Situations seem to have become very bad before any kind of help is obtained. . . We need to learn again how to care for people. We need to develop more concern for our fellow humans.

D.M. Alford, *A Probate Judge's View*, 13 J. of Gerontological Nursing 32 (1994).

Even as altruistic as the above judges may be, there are those judges who oftentimes make up their minds before examining any evidence. Depending upon whom petitioners have for attorneys, or what bent guardian *ad litem* take, some judges habitually respond with no further inquiry before they benevolently order the AIP to the guardianship gulag. Anything more would be considered wasteful and lacking judicial economy.

⁹ See Ingo Keiltz, *Comments Before a Roundtable Discussion on Guardianship*, Special Committee on Aging, U.S. Senate (102d Cong. 2d Sess. 1992)(Serial Number 102-22), p 34. (In their book *Reinventing Government: How the Entrepreneur's Spirit is Transforming the Public Sector*, Osborne and Gaebler assert that governments, including the courts, are in deep trouble today largely because there are huge entrenched bureaucracies that impede the very

WRITTEN COMMENTS

A. Frank Johns

July 22, 2004

Page 6

was no data on state guardianship, and nothing existed on a nationwide basis. Keiltz made the obvious point that neither the federal government, nor each state knows how many individuals are subject to guardianship proceedings annually, what guardianship case loads correlate with population, whether or not they correlate with an elderly population and how they compare when adjusted for the population in different states, different jurisdictions and according to different administrative structures. Keiltz also asserted, as was found by professor Windsor Schmidt and other researchers,¹⁰ that there is insufficient research on social, economic, legal and systemic factors affecting the rates at which guardianship files are created in the courts.

A database for each state and the federal government would provide empirical data by which caseloads could be more carefully forecasted and processed. If the number of wards is known, then necessary funding would provide for sufficient staff, and the cost of training and enforcement. A national database could provide consistency and uniformity in the data entry and retrieval forms of the courts, requiring the same kinds of facts and circumstances that would be gathered across the country. After more than a decade since the first guardianship roundtable, I believe funding of such a database may only be realized through a federal effort because so many states continue to struggle near bankruptcy while still in the dark when it comes to statistics regarding guardianship.

Construction of a national database of guardianship was an important concern of the delegates at Wingspan. Two Wingspan recommendations specifically addressed a lack of data, and the need for a uniform system of guardianship data collection:

4. A uniform system of data collection within all areas of the guardianship process be developed and funded.

Comment: Although significant legislative revisions have been adopted, little data exists on the effectiveness of guardianship within each state or across the states, and less information is available about how the system actually affects the individuals involved.

53. States maintain adequate data systems to assure that required plans and reports are timely filed, and establish an electronic database to house these data while preserving privacy.

It is left to the federal agencies to determine whether or not data could be collected on a national level and integrated with the states. However, individual states have to be more involved

things that are likely to get them out of trouble: creativity, experimentation, risk taking, innovation, consumer orientation - what a strange concept in government - and future forecasting. *Id.*, at 35.

¹⁰ See Windsor Schmidt, *Guardianship - The Court of Last Resort for the Elderly and Disabled* (Carolina Academic Press 1995); see also L. Barritt Lisi, A. Burns, and K. Lussenden, *National Study of Guardian Systems: Findings and Recommendations* (Center for Social Gerontology 1994). The study initially proposed the funding of the construction of a national database, and was modified to only research and analysis.

WRITTEN COMMENTS

A. Frank Johns

July 22, 2004

Page 7

and committed to beginning some form of data collection on the guardianships that are already in place.

III. STATE STATUTORY REFORM RELATING TO COURT TRAINING AND MONITORING WITH ACCOMPANYING WINGSPAN RECOMMENDATIONS

Guardianship history casts light on where guardianship has come from and where it may be headed. Guardianship's own lantern on the stern¹¹ "...should enable us to infer the nature of the waves ahead."¹² The history of guardianship shows that it is primarily built on the doctrine of *Parens Patriae*,¹³ mandating that the State (the King) is the benevolent protector.¹⁴ In those state jurisdictions where the doctrine of *Parens Patriae* continues as the common law or statutory foundation, edicts and reasoned dictates of probate and guardianship judges control. In recent decades, however, a competing view of how guardianship laws should function has emerged, operating from the opposite end of the legal spectrum – the contemporary view based on adversarial process and formality. While each view of the guardianship process as strong support,¹⁵ neither provides the education and training that is now needed to prepare judges and staff for what wards and incapacitated adults will need if they are to be properly served and protected.

¹¹ See Barbara W. Tuchman, *Epilogue - A Lantern on the Stern, The March of Folly, From Troy to Vietnam* (1984).

¹² *Id.* at 383.

¹³ See L. Coleman, T. Solomon, *Parens Patriae Treatment: Legal Punishment in Disguise*, 3 Hastings Const. L.Q., 345-362 (1976).

¹⁴ See Terry Carney, *Civil and Social Guardianship for Intellectually Handicapped People*, 8 Monash L. Rev. 199 (1982); *Parens Patriae* has been defined as the crown as ultimate parent of all citizens. *Id.* at 205, n. 30, citing *Eyre v. Shaftsbury*, 2 P. Wms. 103, 24 E.R. 659 (1722).

¹⁵ Compare Lawrence A. Frolik, Melissa C. Brown, *Advising the Elderly or Disabled Client*, Chp. 17 - Adult Guardianship and Conservatorship, 17-8, 9 (Warren Gorham and Lamont 1992) (Cumm. Supp. 1998):

... [A]n experienced judge may have been exposed to a great deal of unusual or odd behavior and consequently be less prone to interpret it as a lack of incompetency. In most instances, you should advise the client to waive his right to a jury trial ... few states require the alleged incompetent to be represented by counsel ... as a result, many guardianship hearings proceed with no counsel for the alleged incompetent. The court is expected to act in his or her best interest, however, and ensure that the hearing is conducted fairly.

with John J. Regan, *Tax Estate & Financial Planning for the Elderly*, Chp. 16 - Guardians and Conservators, 16-1, 16-23 (Matthew Bender and Co. 1992) (Cumm. Supp. 1995):

The proper function of defense counsel in a guardianship proceeding is to defend the client against the proposed order as vigorously as if the client were on trial in a criminal proceeding. A guardianship proceeding is as much a part of the adversarial system of justice as the criminal trial.

WRITTEN COMMENTS

A. Frank Johns

July 22, 2004

Page 8

The delegates to Wingspan also targeted widespread court education and training, including judges, guardians and related support service professionals:

9. All guardians receive training and technical assistance in carrying out their duties. Organizations, including the National Guardianship Network,^[16] should develop and offer specially designed introductory and continuing guardianship courses for judges, court personnel, families, guardians, proposed fiduciaries, and attorneys practicing in the guardianship area, including training on minimum guardianship standards and ethics.
10. Attention be given to the need for mandatory education for all judges in courts hearing guardianship cases, with special attention to the educational needs of general jurisdiction judges.
11. The Internet and other technology be used to educate and communicate with lawyers, judges, guardians, and other professionals in the guardianship arena.
12. Standards and training for mediators be developed in conjunction with the Alternative Dispute Resolution community to address mediation in guardianship related matters.

Comment: Standards and training should include identification of issues appropriate for mediation, participants in the mediation, use and role of legal representatives, and procedures to maximize self-determination of individuals with diminished capacity. The development of standards should take into consideration the recommendations of the 2000 Joint Conference on Legal and Ethical Issues in the Progression of Dementia^[17] on dispute resolution, and of The Center for Social Gerontology,^[18] and study whether these recommendations should be extended to all types of disability. Mediators should adhere to such standards even if not statutorily required.

16 [Footnote part of the recommendation.] The National Guardianship Network is an informal coalition of associations interested in improving guardianship services for individuals as they age and for those with disabilities. The National Guardianship Network was formed in 2000 and its membership includes the ABA Commission on Legal Problems of the Elderly, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys (NAELA), the National Center for State Courts, the National College of Probate Judges, the National Guardianship Association, and the National Guardianship Foundation. For more information about the National Guardianship Network, contact NAELA at its address, 1604 North Country Club Road, Tucson, Arizona 85716, by telephone (520) 881-4005, by facsimile (520)325-7925, or through its Web site at <<http://www.naela.com>>.

17. [Footnote part of the recommendation.] *Recommendations of the Joint Conference*, 35 Ga. L. Rev. 423, 423–450 (2001).

18.[Footnote part of the recommendation.] Susan J. Butterwick, Penelope A. Hommel & Ingo Keilitz, *Evaluation of Mediation as a Means of Resolving Adult Guardianship Cases* (Ctr. for Soc. Gerontology 2001). Copies of the study are available for a fee by contacting The Center for Social Gerontology by telephone at (734) 665-1126 or by e-mail at <tcsg@tcsg.org>. A copy in PDF format is available through its Web site at <<http://www.tcsg.org>>.

WRITTEN COMMENTS

A. Frank Johns

July 22, 2004

Page 9

45. States adopt minimum standards of practice for guardians, using the National Guardianship Association *Standards of Practice*¹⁹ as a model.

Comment: Lawyers should not be exempt from those standards. Lawyers and courts should be educated and trained in the standards.

48. The public guardianship function include broad-based information and training.

Comment: Broad-based education and training about guardianship and alternatives can divert pressure from the public guardianship system.

Wingspan devoted a separate section to monitoring and accountability. The delegates first looked at changes in statute or regulations:

51. There be mandatory annual reports of the person and annual financial accountings to determine the status of the person with diminished capacity. The report and the accounting should be audited as frequently as possible.
52. To provide effective monitoring, the following are required: (a) a functional assessment of the abilities and limitations of the person with diminished capacity; (b) an order appropriate to meet the needs of the person with diminished capacity (with preference given to as limited a guardianship if possible); (c) an annual plan based on the assessment and an annual report, appropriately updated, based on the plan; and (d) inclusion of any other mandated reports which are the guardian's responsibility, such as reports to the Social Security Administration or the Department of Veterans Affairs.

The delegates then considered what changes should be considered in practice precepts or guidelines that would successfully implement the statutory and regulatory revisions:

53. States maintain adequate data systems to assure that required plans and reports are timely filed, and establish an electronic database to house these data while preserving privacy.
54. Courts have the primary responsibility for monitoring.
55. Monitoring is appropriate regardless of who is the guardian — family member, professional guardian, or agency guardian.
56. Guardianship issues be delegated to judges who have special training and experience in guardianship matters.

19.[Footnote part of the recommendation.] Reprinted at 31 Stetson L. Rev. ___, ___–___ (2002).

WRITTEN COMMENTS

A. Frank Johns

July 22, 2004

Page 10

Comment: Judicial specialization should be encouraged. There is a need to increase expertise of the judiciary and the support staff in guardianship matters. This recommendation should be communicated to legislatures and chief judges who organize court systems.

Further comment on monitoring and accountability was written and published for the Committee's hearing in 2003 by Erica Wood of the ABA Commission on Law and Aging. The Commission's executive director, Nancy Coleman, is before the committee today and will surely update the committee on the Commission's current recommendations.

IV. STATE AND FEDERAL LINKAGE COULD LEAD TO GREATER FEDERAL PROTECTIONS

Are there current federal programs available to the states that could provide advocacy and protection for older Americans under guardianship?

The answer is yes. Implementing such protections through current federal systems that regulate Social Security, Pension Benefits and Veterans Benefits could be efficient and immediate. Social Security could be linked through the Representative Payees Program; pension and other deferred retirement benefits could be linked through federal oversight of qualified retirement plans; and the Department of Veterans Affairs may already be linked through its oversight of state veterans statutory guardianship laws that are in place in most states.

Federal oversight and revenue sharing to train and educate each state judicial branch and supporting social service agencies could also be a component of a proposed initiative like the Elder Justice Act. Such creative federal initiatives could address Guardianship's good by training, educating and mandating standards for public and private guardians, targeted as a source of leadership, a conduit for resources and a linkage to protection and advocacy of vulnerable older Americans of modest means.

Additionally, current federal programs and prospective initiatives could coordinate the confrontation with Guardianship's evil, mounting a national attack through the states, and through volunteer corps of national advocates, pursuing abuse, neglect and exploitation. This will not be easy when such degradation is often at the hands of the very public and private guardians that are sworn to protect the vulnerable older Americans against such risks.

One final source of protection may not be currently attractive, but it may be constitutionally required.²⁰ There should be developed federal regulatory directives through federal agencies with current statutory authority to guide the states in implementing consistent

²⁰ *Rudow v. Commissioner of Division of Medical Assistance*, 707 N.E.2d 339 (Mass. 1999)

WRITTEN COMMENTS

A. Frank Johns

July 22, 2004

Page 11

oversight and intervention in protecting older Americans served in the guardianship process with comprehensive monitoring and accountability.

V. THREE RECOMMENDATIONS

There were three recommendations offered by this author to the committee at the 2003 hearing. Those recommendations, as modified for this forum, continue to need the committee's attention in order to protect against possible wrongdoing inflicted on vulnerable older adults in the guardianship process.

The first recommendation is to fund a major grant that has the single mission of conducting empirical research in all states and the District of Columbia from which there would be developed a primary national guardianship database.

The second recommendation is to federally fund assistance needed to investigate and study ways to implement accountability and monitoring in all states and the District of Columbia. The GAO report is just such a study. While it has limited empirical benefit because of the sample of states used to do the report, the report will be an excellent model to be followed in states not examined.

The third recommendation is to fund court models that educate and train judges, lawyers and other professionals in the guardianship process.

Such funding should be linked in partnership with the National Guardianship Network.

Respectfully submitted,

A. Frank Johns, Esq.